No. 83-1887

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ALEXANDER L. STEVAS
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In The

Supreme Court of the United States

October Term, 1983

STRATFORD PLACE CORP. and SOLIL MANAGEMENT CORP.,

Petitioners,

vs.

JAMES CAPALINO, or his successor in office, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, or their successors in office, constituting the members of the Board of Estimate of the City of New York, and the CITY OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether 28 U.S.C. §1738 precludes petitioners from commencing a federal civil rights action subsequent to state proceedings under Article 78 of the New York Civil Practice Law and Rules.

DESIGNATION OF CORPORATE RELATIONSHIPS

Stratford Place Corp. and Solil Management Corp., filing this petition for certiorari, as petitioners in the proceeding, state that:

1. This is their original Designation of Corporate Relationships.

2. Neither Stratford Place Corp. nor Solil Management Corp. is owned by any parent corporation.

3. Neither Stratford Place Corp. nor Solil Management Corp. has any ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

4. Neither Stratford Place Corp. nor Solil Management Corp. has any affiliates.

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No.

In The

Supreme Court of the United States

October Term, 1983

STRATFORD PLACE CORP. and SOLIL MANAGEMENT CORP.,

Petitioners,

vs.

JAMES CAPALINO, or his successor in office, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, or their successors in office, constituting the members of the Board of Estimate of the City of New York, and the CITY OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Stratford Place Corp. and Solil Management Corp., hereby petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit

affirming the dismissal of their complaint by the United States District Court for the Southern District of New York on the grounds that the action is barred by *res judicata*.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, and the opinion of the United States Court of Appeals for the Second Circuit are set out in the Appendix hereto (1a).

JURISDICTION

This civil rights action was commenced pursuant to Title 28 of the United States Code, Section 1331, and Title 42 of the United States Code, Sections 1983 and 1985 after respondents denied petitioners' applications to redeem two parcels of property located within the City of New York pursuant to the redemption provisions of §D17-25.0 of the New York City Administrative Code.

Respondents moved for summary judgment, pursuant to F.R. Civ. P. 56 on the grounds that this action was barred by *res judicata* as prior state court proceedings commenced by these petitioners pursuant to Article 78 of the New York Civil Practice Law and Rules had been dismissed by the state court. The District Court (Carter, J.), granted the City's motion by order dated September 21, 1983, and entered September 26, 1983. Notice of Appeal to the United States Court of Appeals for the Second Circuit was timely filed on October 7, 1983.

By order dated February 17, 1984, the United States Court of Appeals for the Second Circuit affirmed the decision of the District Court.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, Section 1738; New York Civil Practice Law and Rules, Article 78, §7803 reads as follows:

§7803. Questions Raised

The only questions that may be raised in a proceeding under this article are:

1. Whether the body or officer failed to perform a duty enjoined upon it by law; or

2. Whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. Whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

STATEMENT OF MATERIAL FACTS

Petitioners, Solil Management Corp. and Stratford Place Corp. ("Stratford") were the owners of real property located within the City of New York known as 44 Beaver Street and 15-23 William Street, respectively.

In 1977, the City of New York commenced *in rem* foreclosure proceedings against the properties by reason of Stratford's failure to timely pay real estate taxes and water and sewer charges assessed against said properties.

The City of New York thereafter obtained tax liens on the subject properties and, on or about July 6, 1977, the City obtained default judgments pursuant to §D17-12.0 of the Administrative Code of the City of New York, and obtained title to the subject properties on May 25, 1978, by filing deeds thereon.

Stratford thereafter applied to the Department of Real Estate for mandatory releases of the City's interest in their properties pursuant to the provisions of §D17-25.0 of the Administrative Code of the City of New York. Relying on representations by the City that there was no urgency requiring immediate payment of arrears because releases could be obtained under §D17-25(g), Stratford changed its applications for release to comply with §D17-25(g) (discretionary release provision). However, by reports dated June 28, 1979, the Commissioner of General Services recommended that the Board of Estimate deny both Stratford's applications for releases of the City's interest in its properties. No factual basis or details were set forth in said recommendations. Stratford was never given copies of these reports nor the opportunity to refute them.

By resolutions dated August 16, 1979, the Board of Estimate voted to deny Stratford's applications for releases.

By separate petitions, each dated September 20, 1979, Stratford commenced proceedings in New York Supreme Court pursuant to New York Civil Practice Law and Rules Article 78 seeking a judgment declaring the Board's denial of its applications to redeem its properties to be null and void.

Both petitions sought identical relief as follows:

> . . .Wherefore, Petitioner demands that this Court enter a judgment declaring the denial, by the Board of Estimate of the City of New York, of Petitioner's application for release of the City's interest in the [petitioner's] property. . .to be null, void and of no force and effect and directing the Board of Estimate of the City of New York to grant Petitioner's application for the release of the City's interest in the aforesaid property, together with such other and further relief as to this Court may seem just and proper, together with the costs and disbursements of this Action. [17a].

The City then cross-moved to dismiss the petitions.

By memorandum decisions dated January 21, 1980, Special Term, per Stadtmauer, J., granted the City's motion and dismissed the petitions (7a).

Special Term, in both decisions, held in relevant part that:

> On June 5, 1979, petitioner changed its application from a mandatory release to a discretionary release, pursuant to section D17-25.0(g) of the Administrative Code. That section gives the former owner an opportunity to reacquire the property before it is offered at public auction. At this point, *the statutory scheme vests absolute discretion in the Board of Estimate* as to whether or not to permit the former owner to reacquire his property. . . . Under the circumstances, it cannot be said that respondents' denial of petitioner's application was arbitrary or capricious or an abuse of discretion. . . . [Emphasis supplied.]

By order granted May 21, 1981, New York State's Appellate Division, First Department affirmed, without opinion, the judgments at Special Term, and subsequently denied Stratford's applications for leave to appeal to the New York Court of Appeals.

Stratford then sought leave to appeal directly from the Court of Appeals, which was denied.

Finally, Stratford moved in the New York State Supreme Court to vacate the judgments, which applications were also denied.

After exhausting its remedies within the New York State court system, Stratford commenced this civil rights action under Title 28 of the United States Code, Section 1331 and Title 42 of the United States Code, Sections 1983 and 1985 seeking the following relief:

A. Declaring §D17-25.0 of the Administrative Code of the City of New York unconstitutional on its face as vague, overbroad, and in violation of the federal constitutional guarantees of equal protection, and procedural and substantive due process;

B. Declaring §D17-25.0 unconstitutional as applied to Stratford as a deprivation of its due process and equal protection rights under the federal constitution;

C. Declaring the denial of Stratford's applications for release of the City's interest in its properties by the Board of Estimate, null, void, and of no force and effect and directing the City to grant Stratford's applications for redemptions; and

D. Awarding Stratford damages, pursuant to 42 U.S.C. §1983 and U.S.C. §1985, in the sum of $20,000,000, against the City for the deprivation of its federal constitutional rights.

The City then moved for summary judgment on the grounds that: (1) Stratford's claims are precluded by principles of *res judicata* and collateral estoppel; and (2) Stratford's claims are barred by the Tax Injunction Act. The court below granted the City's motion for summary judgment on the grounds that Stratford's claims were barred by *res judicata* (3a). The lower court did not reach the City's second argument in its decision.

Relying on this Court's recent decision, *Migra v. Warren City School District Board of Education,* 52 U.S.L.W. 4151 (January 24, 1984), the United States Court of Appeals for the Second Circuit affirmed the District Court's decision (1a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW INCORRECTLY APPLIES THE PRINCIPLE OF FEDERAL CLAIM PRECLUSION TO FEDERAL CIVIL RIGHTS ACTIONS COMMENCED SUBSEQUENT TO THE RESOLUTION OF PRIOR STATE COURT PROCEEDINGS.

The District Court held that petitioner's federal civil rights claims were barred under New York's principles of *res judicata.*

> In New York, principles of *res judicata* will apply "in any subsequent action involving the same cause of action not only as to those issues which were actually litigated but also as to any issues which might have been, but were not, litigated in the earlier action. *Winters v. Lavine,* 574 F.2d 46, 56 (2d Cir. 1978). Furthermore, under the transactional analysis approach, used in New York, all claims arising from the same transaction are

> precluded once a final judgment is rendered even if they are based upon different theories or seek a different remedy. *O'Brien v. City of Syracuse,* 54 N.Y. 2d 355, 455 N.Y.S. 2d 687, 688 (1981). Plaintiff's attempt to re-denominate their claims under the rubric of "equal protection" and "due process" is to no avail, as these issues concededly arise from the same transaction, involve the same proof and are premised on the same relief. Hence, defendants' motion for summary judgment is granted [6a].

The Second Circuit, relying on this Court's decision in *Migra v. Warren City School District Board of Education, et al.*, affirmed the decision of the District Court:

> The preclusive effect of state-court judgments on federal civil rights action is to be determined by state law. *Migra v. Warren City School District Board of Education,* 52 U.S.L.W. 4151, 4154 (January 24, 1984). "Section 1983 . . . does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Id.* at 4154. The Court below correctly held that New York law would bar further litigation of the claims which appellants now seek to raise . . . [2a].

It is respectfully submitted that the lower court's analysis of New York claim preclusion as applied to the facts of this case is incorrect, and resulted in the erroneous determination that such claims are barred from being litigated within the forum of a federal civil rights action. Certiorari is sought in order to clarify the scope of this Court's recent decisions regarding the application of federal claim preclusion to such actions.

A. The Scope of Review Is Limited Under an Article 78 Proceeding.

The prior state court proceedings in this matter were limited in scope as they were brought under Article 78 of the New York Civil Practice Law and Rules, seeking reversal of the City's denial of petitioners' applications for the release of its properties.

By statutory definition, only certain questions can properly be raised in an Article 78 proceeding [N.Y. Civ. Prac. Law Article 78; *Serth v. New York State Department of Transportation,* 104 Misc. 2d 545, 429 N.Y.S. 2d 857 (Albany Sup. 1980); *Valentin v. Simon,* 98 Misc. 2d 5, 413 N.Y.S. 2d 266 (New York Sup. 1979)]. Petitioner's proceeding was brought pursuant to §7803, which states in relevant part:

> §7803(3) . . . 3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. . . .

As evidenced by petitioners' prayers for relief (17a), the precise issue of respondents' abuse of discretion alone could be raised by their petitions. Petitioners could not have litigated their constitutional claims in these proceedings unless the New York court had converted the petitions to declaratory judgment actions, which it did not do in these cases. [*Lombard v. Board of Education of City of New York,* 502 F. 2d 631 (2d Cir. 1974), *cert. denied,* 429 U.S. 976, 955 S. Ct. 1400, 43 L. Ed. 2d 656 (1975); *Merced v. Fisher,* 38 N.Y. 2d 557, 381 N.Y.S. 2d 817, 345 N.E. 2d 288 (1976)].

Furthermore, an Article 78 proceeding has been specifically held to be an unsuitable vehicle for testing the constitutionality of legislation. [*Allies Boulevard Bookstore, Inc. v. Cohen,* 90 App. Div. 2d 935, 457 N.Y.S. 2d 913 (1982); *Devereaux v. New York*

State Teacher's Retirement Board, 75 App. Div. 2d 277, 429 N.Y.S. 2d 743 (3d Dept. 1980)].

Accordingly, the precise issue raised in petitioner's federal civil rights action; *i.e.,* the constitutionality of §D17-25.0 of the New York City Administrative Code, could not be raised in petitioner's original Article 78 proceeding.

B. New York Claim Preclusion

This Court has recently reaffirmed that prior state court judgments should be given the same preclusive effect in federal court that they would be given by the state courts when a federal civil action suit is commenced subsequent to the resolution of related state court proceedings (*Migra, supra*). Under the New York law to be applied by the federal courts in this action, "neither res judicata nor collateral estoppel will bar a plaintiff's claim where there has been no opportunity to litigate." [*Perry v. Perry,* 79 App. Div. 2d 851, 434 N.Y.S. 2d 496 (4th Dept. 1980)].

As this Court points out in its holding in *Migra,* it is the District Court, in the first instance, that should interpret the applicable state preclusion law and apply it. The District Court recognized:

> In New York, principles of *res judicata* will apply not only as to those issues which were actually litigated, but also to any issues *which might have been, but were not, litigated in the earlier action."* *Winters v. Lavine,* supra. [Emphasis added, 6a.]

The court failed, however, to recognize that due to the limited scope of an Article 78 proceeding, the issues raised in petitioner's federal civil rights action were not litigated before the state court for the simple reason that they could not be raised within such a proceeding.

It is respectfully submitted that the District Court herein erroneously dismissed petitioners' complaint by incorrectly applying New York's principles of *res judicata* to the facts of this case, and holding that petitioners' claims were barred.

It is respectfully submitted that this Court's decision in *Migra,* while intended to clarify the fact that federal principles of claim preclusion are coextensive with those of the states, was not meant to preclude the commencement of an action in federal court when such action would not have been precluded in the state court either.

Petitioners could have commenced a subsequent plenary action in the state court and raised its contitutional claims therein, due to the recognition by the courts of the limited scope of review of the Article 78 proceeding. Petitioners simply chose to raise these issues within the federal rather than the state courts. Surely, petitioners still have a choice of forum.

C. The Lower Court Incorrectly Applied *Migra*.

It is respectfully submitted that the lower court incorrectly applied this Court's directive in *Migra* to the present case in that the courts failed to address the distinctions between *Migra* and the case at bar.

A state statute (Article 78 of the Civil Practice Law and Rules) in the present case precluded the raising of petitioner's civil rights claims in the proceedings brought in state court. The plaintiff in *Migra* did not face such a statutory limitation in her initial institution of an action. The plaintiff's discretion controlled which issues should or should not be raised in *Migra*.

This Court's directive in *Migra* was aimed at avoiding continuous litigation where all issues can be resolved in one action. Unlike *Migra,* the present case complies with this directive.

In addition, the case at bar is further distinguishable from *Migra* in that the petitioner herein, unlike the petitioner in *Migra,* did assert before the lower court that the New York state courts would not have adjudicated their federal claims had they been presented in their original state court proceeding. This Court specifically addressed this fact in *Migra* wherein it found:

> . . . petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court . . . [*Migra, supra.*]

Despite this distinction, the Court of Appeals affirmed the District Court's dismissal of petitioners' federal claim.

The decisions of the lower courts herein have left petitioners in an impossible and unfair situation. By commencing proceedings in the state court in the nature of certiorari and mandamus under Article 78 of the Civil Practice Law and Rules for the limited purpose of seeking a review of the City's actions, they have now been precluded from raising any constitutional challenge to the provisions of New York City's Administrative Code, which were relied upon by the state courts in those very proceedings which upheld the City's actions.

Petitioners here do not seek two bites of the same apple, but rather continue to seek just one opportunity to litigate their challenge to the provisions of New York City's Administrative Code provisions upon which the state courts relied.

The fact that petitioners chose the federal forum for their challenge should not result in their being barred from commencing such an action. It is respectfully submitted that such was not the intended result of either the federal or state principles of claim preclusion.

For these reasons, it is respectfully requested that this writ of certiorari be granted.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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M. ALLAN HYMAN
Of Counsel

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED FEBRUARY 17, 1984

UNITED STATES COURT OF APPEALS
For the Second Circuit
83-7837

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of February, One Thousand Nine Hundred and Eighty-Four.

PRESENT:

HON. WILLIAM H. TIMBERS, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*
HON. EDWARD D. RE, *Chief Judge, U.S. Court of International Trade**

STRATFORD PLACE CORP. and SOLIL MANAGEMENT CORP.,

Plaintiffs-Appellants,

-v-

JAMES CAPALINO, or his successor in office, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, or their successor in office, constituting the members of the Board of Estimate of the City of New York, and the CITY OF NEW YORK,

Defendants-Appellees.

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* Sitting by designation.

Order

Plaintiff-appellants, Stratford Place Corp. and Solil Management Corp., appeal from an order of the United States District Court for the Southern District of New York (Carter, J.) granting summary judgment to defendant-appellees in appellants' civil rights action. Appellants contend that New York City's in rem tax foreclosure proceedings against appellant's property violated appellant's due process and equal protection rights. Appellants have extensively and unsuccessfully presented their claims regarding the tax foreclosure in New York state courts.

The preclusive effect of state-court judgments on federal civil rights actions is to be determined by state law. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 52 U.S.L.W. 4151, 4154 (January 24, 1984). "Section 1983 . . . does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Id.* at 4154. The court below correctly held that New York law would bar further litigation of the claims which appellants now seek to raise. *See, e.g., O'Brien v. City of Syracuse,* 54 N.Y.2d 353 (1981).

Affirmed.

s/ Hon. William H. Timbers
s/ Hon. Ellsworth A. Van Graafeiland
s/ Hon. Edward D. Re

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED SEPTEMBER 26, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1610 (RLC)

STRATFORD PLACE CORP. and SOLIL MANAGEMENT CORP.,

Plaintiffs,

-against-

JAMES CAPALINO, or his successor in office as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, or their successors in office, constituting the members of the Board of Estimate of the City of New York, and the CITY OF NEW YORK,

Defendants.

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Opinion

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Carter, District Judge

OPINION

Plaintiffs have brought this action to declare null and void New York City's ("The City") interest in their property and for damages for the defendants' alleged violation of plaintiffs' constitutional rights. Defendants have moved for summary judgment pursuant to Rule 56, F.R.Civ.P., on the grounds that the action is barred by *res judicata*. The facts and procedural history of this case were treated recently in *Stratford v. Capalino*, 82 Civ. 1610, slip op. (Oct. 25, 1982), where the court denied plaintiffs' motion for a preliminary injunction. There, I held that plaintiffs could not meet the requisites for a preliminary injunction and that furthermore, relief would be barred by *res judicata* and collateral estoppel. I see no reason to deviate from that position.

Opinion

The dispute centers on plaintiffs' failure, since 1974, to pay taxes on property owned on Beaver and William Streets. The amount of the unpaid taxes and interest gave the city a lien on the property in excess of $2,500,000. Plaintiffs attempted unsuccessfully to have the Board of Estimate reconvey the property. Failing to do so, they instituted an Article 78 proceeding in State Supreme Court in New York County in September, 1979. The petition was dismissed on February 21, 1980. The Appellate Division affirmed the dismissal, and leave to appeal to the New York Court of Appeals was denied on December 17, 1980. Plaintiffs' motion for reconsideration before the State Supreme Court pursuant to CPLR §5015 was likewise denied on June 30, 1982.

Plaintiffs now contend that the issues argued here either were not raised in the state court proceedings or, if they were, were not sufficiently litigated. Specifically, plaintiffs urge that §D17-25.0 of the Administrative Code of the City of New York be declared unconstitutional on its face and as applied to them because it violates equal protection and substantive and procedural due process guaranteed by the United States Constitution. Plaintiffs' claims have no merit.

On appeal to the Appellate Division, First Department, plaintiffs raised the same issues, albeit couched in slightly different terms. There, they argued that the Board of Estimate's denial of petitioners' application for release of the City's interest in their property violated the United States Constitution because it constituted a taxing of petitioners' property without due process of law. The First Department found that denial of the application was not arbitrary and capricious and was not a taxing of plaintiffs' property without due process of law.

Plaintiffs also alleged that the Board of Estimate had formulated a policy excluding a class of applicants from the right to obtain a release of the City's interest in their *in rem* foreclosure of the acquired property and that this willful "class exclusion" was obvious from the type of forms used for *in rem* foreclosures. *See* Defendants' Exhibit M at 31, fn. 15. This argument was similarly dismissed by the First Department.

In New York, principles of *res judicata* will apply "in any subsequent action involving the same cause of action not only as to those issues which were actually litigated but also as to any issues which might have been but were not, litigated in the earlier action. *Winters v. Lavine,* 574 F.2d 46, 56 (2d Cir. 1978). Furthermore, under the transactional analysis approach, used in New York, all claims arising from the same transaction are precluded once a final judgment is rendered even if they are based upon different theories or seek a different remedy. *O'Brien v. City of Syracuse,* 54 N.Y.2d 355, 445 N.Y.S.2d 687, 688 (1981). Plaintiffs' attempt to re-denominate their claims under the rubric of "equal protection" and "due process" is to no avail, as these issues concededly arise from the same transaction, involve the same proof and are premised on the same relief. Hence, defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

Dated: New York, New York
September 21, 1983

ROBERT L. CARTER
U.S.D.J.

MEMORANDUM DECISION OF THE SUPREME COURT, COUNTY OF NEW YORK DATED JANUARY 21, 1980

SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM, PART I

Index No. 18294/79

In the Matter of the Application of STRATFORD PLACE CORP., a New York corporation,

Petitioner,

-against-

JAMES CAPALINO, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, constituting the members of the Board of Estimate of the City of New York,

Respondents.

STADTMAUER, J.:

This is an application by petitioner pursuant to CPLR Article 78, to annul the determination of respondents denying its application for release of the City's interest in certain property. Respondents cross move, pursuant to CPLR 7804 (f), to dismiss the petition for legal insufficiency.

Petitioner is the former owner of a certain real property know as 13-23 William Street, New York, N.Y. In mid 1977, the City of New York commenced an *in rem* foreclosure proceeding against

the property pursuant to the provisions of Chapter 17 Title D of the Administrative Code of the City of New York, to foreclose tax liens that were due and unpaid for a period of one or more years. The amount of such unpaid real estate taxes and water sewer charges assessed against the property was one million seven hundred thousand dollars ($1,700,000). On May 25, 1978 the City obtained title to the property by entry of a judgment of foreclosure and delivery of a deed, pursuant to section D17-12.0 of the Administrative Code.

Section D17-25.0 of the Administrative Code permits the former owner of such propety to reacquire the parcel taken by filing an application for a release of the City's interest in the property within four months after the City's acquisition thereof and upon payment of all amounts required to be paid within 60 days. If these conditions are complied with, the City must restore title to the former owner. This four month period is referred to as a "mandatory period" during which time the City has no discretion but to return the property to the former owner upon the latter's compliance with the conditions precedent.

It is undisputed that petitioner failed to pay the requisite charges within the 60 day period provided by statute necessary to obtain a mandatory release of the property.

Thereafter, in apparent recognition of the fact that it could no longer apply for a mandatory release of the propety, on June 5, 1979, petitioner charged its application from a mandatory release to a discretionary release, pursuant to section D17-25.0 (g) of the Administrative Code. That section gives the former owner an opportunity to reacquire the property before it is offered at public auction. At this point, the statutory scheme vests absolute discretion in the Board of Estimate as to whether or not to permit

the former owner to reacquire his property. Petitioner's application for a discretionary release was placed on the calendar of the Board of Estimate. On August 16, 1979, the Board of Estimate voted to deny this application. No notice was sent to petitioner that its application was on the calendar for that day and that petitioner could, if it so desired, have testified before the Board of Estimate. Respondents assert that there is no statutory requirement mandating the giving of such notice, inasmuch as the Board of Estimate calendar is a public record. Petitioner fails to point to any provision in law mandating the giving of actual notice to an applicant that its application is on the Board's calendar.

Under the circumstances, it cannot be said that respondents' denial of petitioner's application was arbitrary or capricious or an abuse of discretion (Matter of Dwyer v. Lindsay, 23 NY2d 562). Petitioner's contention that the action of respondents constituted a taking of property without due process of law is wholly without merit.

Accordingly, the application of petitioner is denied and the cross motion of respondents is granted and the petition is dismissed.

Settle judgment.

Dated: January 21, 1980

s/

J.S.C.

NOTICE OF PETITION TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of STRATFORD PLACE CORP., a New York corporation,

Petitioner,

-against-

JAMES CAPALINO, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, constitituting the members of the Board of Estimate of the City of New York,

Respondents.

S I R:

PLEASE TAKE NOTICE that upon the annexed petition of STRATFORD PLACE CORP., verified on the 20th day of September, 1979, an application will be made to this Court at a Special Term, Part 1 thereof, to be held at the County Court House, 60 Centre Street, New York, New York, on the 19th day of October, 1979, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for a judgment granting the relief demanded in the petition, and that a verified answer, and supporting affidavits, if any, must be served at least five days before such time.

Notice of Petition

PLEASE TAKE FURTHER NOTICE that pursuant to Section 7804 of the Civil Practice Law and Rules you are directed to file with the Clerk of the Court your answer and supporting affidavits, etc., together with a certified transcript of the record of the proceedings under consideration and the entire official file containing the records of petitioner herein held by the respondent.

New York County is designated as the place of trial, that being the County where respondent made the determination petitioner complains of in its petition.

SHEA GOULD CLIMENKO & CASEY
Attorneys for Petitioner
330 Madison Avenue
New York, New York 10017
(212) 661-3200

To:
JAMES CAPALINO
Commissioner, General Services
City of New York
Municipal Building
New York, New York 10017

THE BOARD OF ESTIMATE TO THE CITY OF NEW YORK

PETITION TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of STRATFORD PLACE CORP., a New York corporation,

Petitioner,

-against-

JAMES CAPALINO, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, constituting the members of the Board of Estimate of the City of New York,

Respondents.

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Petitioner, Stratford Place Corp. by its attorneys Shea Gould Climenko & Casey, complaining of the respondents, respectfully alleges:

1. At all times hereinafter mentioned, Stratford Place Corp. or its predecessors in interest, was the owner of certain real property located within the City, County and State of New York known as 13-23 William Street, Block 25, Lot 35 (the "property").

2. Respondent James Capalino, is Commissioner of General Services of the City of New York.

3. Respondent Edward I. Koch, Harrison J. Goldin, Carol Bellamy, Andrew S. Stein, Stanley Simon, Howard Golden, Donald R. Manes, and Anthony R. Geota constitute the Board of Estimate of the City of New York.

4. On or about June 28, 1977 the City of New York commenced an *In Rem* foreclosure proceeding against the aforesaid property by reason of Petitioner's failure to timely pay real estate taxes and water and sewer charges assessed against said property of $1,700,000.

5. In accordance with the *In Rem* proceeding The City of New York obtained a tax lien on the subject property and, on or about July 6, 1977 The City obtained a default judgment pursuant to Section D17-12.0 of the Administrative Code of New York.

6. The City obtained title to the aforesaid property on May 25, 1978, by filing a deed thereon.

7. In accordance with the provisions of §D17-12.0 of the Administrative Code of the City of New York, petitioner applied to The Department of Real Estate for the mandatory release of the City's interest in in the property. On November 23, 1978, the Corporation of the City of New York agreed to the release of the aforesaid property.

8. At the time corporation counsel agreed to the release of the property, petitioner was informed that the period for mandatory release would expire on December 29, 1978. Prior to

December 29, 1978, representatives of Petitioner met with representatives of The Department of Real Estate and agreed with said representatives upon a schedule for the payment of the unpaid taxes and water and sewer charges assessed against the property. The Department of Real Estate advised Petitioner that there was no urgency requiring immediate payment because there would be no problem for Petitioner in obtaining the release of the property in accordance with §D17.25.0 of the Administrative Code.

9. Section D17-25.0 of the Administrative Code provides in pertinent part that:

> "g. If an application for a release of the city's interest in property acquired by in rem tax foreclosure has been filed within the time allowed in subsection a of this section, but more than four months after the date of the city's acquisition, the board of estimate may in its discretion, authorize the release of the city's interest in said property, pursuant to this section, providing the application has been approved by the corporation counsel as to form, timeliness and eligibility of the applicant and providing the city has not sold or otherwise disposed of said property and provided further that said property has not been condemned or assigned to any agency of the city and is not the subject of contemplated use for any capital of urban renewal project of the city."

10. In accordance with §D17-25.0, Petitioner proceeded to change its application for release of the City's interest in the property from mandatory to discretionary. Petitioner did this by sending a letter, dated March 1, 1979 to the Department of Real Estate.

Petition

11. On or about March 2, 1979, The Department of General Services wrote Petitioner acknowledging the letter and asking for an affidavit detailing real estate taxes in arrears of all Petitioner's other properties.

12. The letter asked that the affidavit be submitted on or before April 4, 1979 in order to be presented at the next regularly scheduled meeting of the Board of Estimate.

13. On March 7, 1979, the requested affidavit was forwarded to the Commissioner of General Services.

14. Despite assurances from the City and its representatives, the Commissioner of General Services did not place Petitioner's application on the Board of Estimate Calendar. On July 9, 1979 Petitioner was forced to move, by Order to Show Cause, to compel the Commisioner of General Services to place Petitioner's application for release of the City's interest in the property on the Board of Estimate Calendar.

15. In direct response to Petitioner's above referenced motion, the Commissioner of General Services agreed to place Petitioner's application on the Board of Estimate Calendar for August 16, 1979.

16. At a date unknown to Petitioner, the Commissioner of General Services prepared a report for the Board of Estimate which, Petitioner has reason to believe, recommended that the Board of Estimate deny Petitioner's application for release of the City's interest in the property on the grounds that the property involved was the subject of a contemplated use by the City.

17. Petitioner was never given a copy of the aforesaid report and recommendation or the opportunity to refute same.

18. At the time of the report and recommendation referred to above, the City was aware of the fact the property herein had a value far in excess of the $1,700,000 in unpaid real estate taxes and water and sewer charges.

19. The records of the New York City Real Estate Department do not indicate that the City has sold or otherwise disposed of said property and do not indicate that said property has been condemned or assigned to any City agency.

20. On August 16, 1979 the Board of Estimate voted to deny Petitioner's application for release of the City's interest in the property. Petitioner was notified of the Board of Estimate's action by letter dated August 24, 1979.

21. The denial of Petitioner's application for release of the City's interest in the aforesaid property was improper and illegal in that it was arbitrary, capricious and constituted an abuse of discretion.

AS AND FOR A SECOND CAUSE OF ACTION

22. Petitioner repeats and realleges each and every allegation set forth in paragraphs 1 through 21 herein.

23. The denial of Petitioner's application for release of the City's interest in the property herein is in violation of the Constitution of the United States of America and the Constitution of the State of New York in that the denial of Petitioner's application constitutes the taxing of Petitioner's property without due process of law.

Wherefore, Petitioner demands that this Court enter a judgment declaring the denial, by the Board of Estimate of The City of New York, of Petitioner's application for release of the City's interest in the property known as 13-23 William Street (Block 25, Lot 35) to be null, void and of no force and effect and directing the Board of Estimate of The City of New York to grant Petitioner's application for the release of the City's interest in the aforesaid property, together with such other and further relief as to this Court may seem just and proper, together with the costs and disbursements of this Action.

SHEA GOULD CLIMENKO
& CASEY
Attorneys for Petitioner
330 Madison Avenue
New York, New York 10017
212 661-3200

CORPORATE VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Sol Goldman, being duly sworn, deposes and says, that he is the President of Stratford Place Corp., the corporation named in the within action; that he has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

s/ Sol Goldman
SOL GOLDMAN

SWORN TO BEFORE ME THIS
20th DAY OF SEPTEMBER, 1979.

s/ Louisa Little
NOTARY PUBLIC

LOUISA LITTLE
Notary Public, State of New York
No. 31-4624495
Qualified in New York County
Commission Expires March 30, 1980

Office - Supreme Court, U.S.
FILED
JUN 18 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1887

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

STRATFORD PLACE CORP. and SOLIL MANAGEMENT CORP.,

Petitioners,

-against-

JAMES CAPALINO, or his successor in office, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, or their successors in office, constituting the members of the Board of Estimate of the City of New York, and the CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IRVING GENN,
of Counsel.

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the District Court properly dismissed and the Court of Appeals properly affirmed the dismissal of the complaint as precluded under principles of res judicata by judgments entered and affirmed in the State court?

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No. 83-1887

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

STRATFORD PLACE CORP. and SOLIL MANAGEMENT CORP.,

Petitioners,

-against-

JAMES CAPALINO, or his successor in office, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, or their successors in office, constituting the members of the Board of Estimate of the City of New York, and the CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

(1)

Petitioner corporations are the former owners of separate, adjoining parcels of improved real

estate, 15-23 William Street and 44 Beaver Street, Manhattan (2a, 3a, 4a, 29a).* Mr. Sol Goldman is president of each corporation (29a, 6a; Deft's Exh. L, p. 20). In 1977, New York City commenced in rem foreclosure proceedings pursuant to its Administrative Code, Chapter 7, Title D against each parcel since real estate taxes and water and sewer charges had gone unpaid with respect to each parcel for more than three years. As to plaintiff Stratford, the arrears amounted to approximately $1,700,000 (74a), while as to plaintiff Solil the amount was about $1,050,000 (Deft's Exh. L. p. 14). New York City acquired title to each property on May 24, 1978 (64a).

N.Y.C. Administrative Code, section D17-25.0 permits former owners of real property taken in an in rem tax foreclosure proceeding to reacquire the parcel taken by filing an application for a release of

*Parenthetical references with suffix "a" are to Joint Appendix in Court of Appeals, Second Circuit, unless otherwise indicated.

the City's interest in the property. If the application is made within four months after the date of the City's acquisition of the property and the Corporation Counsel approves the former owner's application as to form, timeliness and eligibility, and the applicant pays all amounts required to be paid within sixty days of the date on which a letter requesting such payment is mailed to the applicant, then the City must restore title to the former owner. Within this four-month period, referred to as a "mandatory period," the City may not sell or assign the property to any party or agency. The statute states further, at §D17-25.0(g), that if an application is filed after the four-month "mandatory period" but within two years from the date on which the City's deed to the parcel was recorded, (which would be an additional twenty months after the four-month mandatory period expires) then the Board of Estimate of the City of New York may, in its discretion, authorize the release of the City's interest in the parcel. The twenty-months period of time which runs after the four-month "mandatory

period" expires is referred to as a "discretionary period." If the Board of Estimate, in its discretion, authorizes the release of the City's interest in the property, the former owner has sixty days from the receipt of a request for payment to make full payment.

Within four months of the City's acquisition of their former properties, each petitioner applied for mandatory release of the City's interest (5a, 73a; Exh. L, p. 34). Neither, however, paid the arrears on their former properties; instead, each petitioner changed its application for mandatory release to an application to the Board of Estimate for discretionary release (76a; Exh. L, p. 37). On August 16, 1979, the Board of Estimate voted to deny each petitioner's application for discretionary reconveyance (81a; Exh. L, p. 42).

(2)

By separate petitions, each verified by Mr. Goldman on September 20, 1979, each petitioner commenced proceedings pursuant to NY CPLR Article 78 seeking review and annulment of the

Board's denials (53a-60a; Exh. L, pp. 13-2).

Stratford's petition alleged that, while its application for mandatory reconveyance was pending, representatives of the City's Department of Real Estate advised Stratford that payment of its arrears was not an urgent matter, that there would be no problem in Stratford's reacquiring the subject property through a discretionary application. Stratford changed its application to a discretionary one. Also asserted by Stratford was that it had not been provided a copy of, nor the chance to refute, a report prepared by the Commissioner of General Services regarding its discretionary reconveyance application pending with the Board of Estimate. Stratford urged that the Real Estate Department's records showed that its former property had not been sold, condemned, assigned to a City agency, or otherwise disposed of. Finally, Stratford's petition alleged that its application for reconveyance was placed on the Board's calendar of August 16, 1979 as a result of a motion Stratford had made in court for an order requiring its application to be so

calendared (53a-60a). Based on the foregoing, Stratford's petition alleged, as a first cause of action, that the Board's denial of its application was, "improper and illegal in that it was arbitrary, capricious and constituted an abuse of discretion," and, as a second cause of, that the denial had violated the New York and United States Constitutions because it "constitutes the taxing [sic] of petitioner's property without due process of law" (58a). The relief requested was an order vacating the Board of Estimate's denial and requiring the Board to grant the discretionary reconveyance application (59a).

Petitioner Solil demanded the same relief based upon the same causes of action (Exh. L, pp. 13-20). Save for differences in dates, its factual allegations were substantially identical. However, Solil did not allege that its application for reconveyance was placed on the Board of Estimate's calendar as the result of its motion. Solil's petition also alleged that, pursuant to an agreement it had reached with the Department of Real Estate "in or

about June, 1979," for reconveyance of its former property, Solil tendered $500,000 on June 1, 1979 as partial payment of its arrears. The petition alleged further that the tender was refused "because the Real Estate Department could not guarantee that the City would release its interest in the aforesaid property" (Exh. L, p. 17).

The respondents in State court moved to dismiss the petitions (61a; Deft's Exh. L, pp. 21-43). The affidavits of Assistant Corporation Counsel David Dworetsky submitted in support of each cross-motion addressed the factual and legal issues raised in the petitions. Pursuant to Administrative Code SD17-28.0, the possibility of entering into installment agreements for payment of back taxes had been available to Solil and Stratford. Statutory authorization for such agreements extended only until January 31, 1979, but neither Solil nor Stratford took advantage of the possibility by making application (67a; Exh. L, p. 27). Particularly with respect to Solil's allegation of the June, 1979 agreement, the Dworetsky affidavit noted that by

that date, the Real Estate Department lacked authority to enter into agreements. Further, since Solil's right to mandatory reconveyance had expired, the Department could not have agreed and did not agree to release the City's interest in Solil's former property in return for payment of arrears (Exh. L, p. 29).

Further, the Dworetsky affidavits pointed out that the petitioners had no property rights left in these parcels after the judgment of foreclosure in the in rem proceeding had divested them (70a). They were not entitled to notice of the Board of Estimate hearing on their applications for discretionary reconveyance, but the date and calendar of such hearings are a matter of public record, and they had a right to testify (69a).

On January 21, 1980, the cross-motions to dismiss the petitions were granted by the Supreme Court, New York County (48a-50a; Exh. L, pp. 7-10). With respect to each case, the Court held, inter alia, that the "contention that the action of respondents constituted a taking of property without

due process of law is wholly without merit" (50a). Judgments dismissing the petitions were entered February 19, 1980 (46a-47a; Exh. L, pp. 5-6).

(3)

On appeal to the Appellate Division, First Department, the petitioners submitted virtually identical main briefs (Exhibits, B, M), and reply briefs (Exhibits D, O), raising due process and class exclusion points. Respondents' briefs to the Appellate Division controverted these arguments (Exhibits C, N). The Appellate Division affirmed without opinion the judgments rendered by the Supreme Court (Exhibits E, P) and subsequently denied petitioners' applications for leave to appeal to the New York Court of Appeals.

Petitioners then sought leave to appeal from the Court of Appeals. They filed separate motions and supporting affidavits, but relied on a single brief (Exhibits F, Q). They appended exhibits - a magazine article and minutes - thereby attempting to impute a conspiracy to realize a profit by selling the property at auction. Respondents opposed the grant

of permission to appeal (Exhibits G, R). Affidavits by Assistant Corporation Counsel Morris Einhorn asserted in pertinent part that "Any contention that, in acquiring tax delinquent parcels, the City may only 'get stuck' with unprofitable and abandoned parcels that will deplete its tax collections by necessitating continued maintenance for the occupants thereof, without any countervailing 'profit' from a saleable parcel, is a 'standard' that has never been legislatively prescribed since it would obviously defeat a locality's ability to collect taxes" (Exhibit G, p. 6; Exhibit R, p. 6). On September 17, 1981, the Court of Appeals denied each petitioner's application (Exhibits H, S).

By notices of motion dated March 12, 1982, petitioners applied to the Supreme Court, New York County to vacate the judgments entered in February, 1980, basing their requests upon the interests of justice and on the claim of newly discovered evidence (Exhibits I, T). The latter consisted of the same magazine article and minutes previously submitted to the Court of Appeals. The

respondents opposed the motions to vacate the judgments (Exhibits J, U). After consolidating the motions for purposes of disposition, and after addressing on the merits each issue raised by petitioners, the Supreme Court denied the motions in a decision and order dated June 30, 1982 and entered July 8, 1982 (85a-90a).

The present action, pursuant to 42 U.S.C. 1983 and 1985, was commenced in March, 1982, shortly after the motion to vacate the State court judgments was initiated. The complaint alleges no facts that were not presented at some stage of the State court litigations. Based on a recapitulation of these claimed facts, it alleges deprivation of due process and equal protection and a conspiracy, and that therefore New York City Administrative Code §D17-25.0, as applied, should be declared unconstitutional (11a-15a).

The respondents moved for summary judgment, based upon the preclusive effects of res judicata, collateral estoppel and 28 U.S.C. §§1341, 1738 (28a).

DECISIONS BELOW

(1)

Upon respondents' motion for summary judgment, the District Court noted that it had previously denied petitioner a preliminray injunction on the grounds that they could not meet the requisites and that furthermore they were barred by res judicata and collateral estoppel. Stratford v. Capalino, 82 Civ. 1610. The Court stated the facts and issues and declared, "Plaintiff's claims have no merit." The opinion continues: (93a-94a):

> "On appeal to the Appellate Division, First Department, plaintiffs raised the same issues, albeit couched in slightly different terms. There, they argued that the Board of Estimate's denial of petitioners' application for release of the City's interest in their property violated the United States Constitution because it constituted a taxing of petitioners' property without due process of law. The First Department found that denial of the application was not arbitrary and capricious and was not a taxing of plaintiffs' property without due process of law.
>
> Plaintiff also alleged that the Board of Estimate had formulated a policy excluding a class of

applicants from the right to obtain a release of the City's interest in their in rem foreclosure of the acquired property and that this willful "class exclusion" was obvious from the type of forms used for in rem foreclosures. See Defendants' Exhibit M at 31, fn. 15. This argument was similarly dismissed by the First Department.

In New York, principles of res judicata will apply "in any subsequent action involving the same cause of action not only as to those issues which were actually litigated but also as to any issues which might have been, but were not, litigated in the earlier action." Winters v. Lavine, 574 F.2d 46, 56 (2d Cir. 1978). Furthermore, under the transactional analysis approach, used in New York, all claims arising from the same transaction are precluded once a final judgment is rendered even if they are based upon different theories or seek a different remedy. O'Brien v. City of Syracuse, 54 NY2d 355, 445 NYS2d 687, 688 (1981). Plaintiffs' attempt to re-dominate their claims under the rubic of 'equal protection' and 'due process' is to no avail, as these issues concededly arise from the same transaction, involve the same proof and are premised on the same relief. Hence, defendants' motion for summary judgment is granted."

(2)

The Court of Appeals, Second Circuit, affirmed, stating (Appendix to Petition for Writ of Certiorari, p. 2a):

> "Plaintiff-appellants, Stratford Place Corp. and Solil Management Corp., appeal from an order of the United States District Court for the Southern District of New York (Carter, J.) granting summary judgment to defendant-appellees in appellants' civil rights action. Appellants contend that New York City's in rem tax foreclosure proceedings against appellant's property violated appellant's due process and equal protection rights. Appellants have extensively and unsuccessfully presented their claims regarding the tax foreclosure in New York state courts.
>
> The preclusive effect of state-court judgments on federal civil rights actions is to be determined by state law. Migra v. Warren City Sch. Dist. Bd. of Educ., 52 U.S.L.W. 4151, 4154 (January 24, 1984). 'Section 1983 . . . does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims.' Id. at 4154. The court below correctly held that New York law would bar

> further litigation of the claims which appellants now seek to raise. See, e.g., O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981)."

REASONS FOR DENYING THE WRIT

THE JUDGMENT OF THE STATE COURTS WAS PROPERLY GIVEN RES JUDICATA EFFECT BY THE FEDERAL COURT.

(1)

The petitioners, in their petitions for certiorari, do not question the rule of Migra v. Warren Cty. Sch. Dist. Bd. of Educ., ___ U.S. ___, 104 S. Ct. 892 (1984) that a judgment of a state court precludes relitigation in federal court of issues that were or could have been raised in the State forum. Nor do they dispute that under the New York State transactional analysis rule all claims arising from the same transaction are precluded by a final judgment, even if based on different theories or seeking diffferent remedies. O'Brien v. Syracuse, 54 NY2d 353, 155 NE 2d 1158 (1980). Rather, they assert that the constitutional issues they would raise could not be raised in a New York State CPLR Article 78 proceeding.

This is a spurious argument that presents no substantial question for review, as the New York Courts frequently consider constitutional questions in Article 78 proceedings. E.g.g., Matter of Board of Educ. v. Nyquist, 31 NY2d 468 293 NE 2d 819 (1973); Matter of Westchester Ref. Temple v. Brown, 22 NY2d 488, 239 NE 2d 891 (1968); Matter of Posner v. Rockefeller, 31 AD2d 352, 297 NYS 2d 867 (3rd Dept. 1969); Matter of Calzadilla v. Dooley, 29 AD2d 152, 286 NYS 2d 510 (4th Dept., 1968). An Article 78 proceeding is the proper vehicle to test whether a statute has been applied in an unconstitutional manner. Matter of Fulling v. Palumbo, 21 NY2d 30, 233 NE 2d 272 (1967); Matter of Solnick v. Whalen, 49 NY2d 224, 401 NE 2d 190 (1980). If the constitutional challenge in an Article 78 proceeding is directed against a statute and all necessary parties are before the Court, the New York State Supreme Court, pursuant to CPLR 103 subd. c, is required to consider it by treating the proceeding as an action for a declaratory judgment. Matter of Kovarsky v. Housing and Development,

31 NY2d 184, 192, 286 NE 2d 882 (1972); Matter of Concord Realty v. City of New York, 30 NY2d 308, 314, 284 NE 2d 148 (1972); see, Matter of First Nat. City Bank v. City of New York, 36 NY2d 87, 94, 324 NE 2d 861 (1975). An asserted violation of due process is available as a question for State review under the third paragraph of CPLR 7803: "... whether a determination was made in violation of lawful procedure [and] was affected by an error of law." Matter of Solnick v. Whalen, supra.

Federal courts have frequently recognized the preclusive effect of judgments concerning constitutional issues arising from Article 78 proceedings. Powell v. Ward, 643 F. 2d 924, 934 (2d Cir., 1981); Ellentuck v. Klein, 570 F. 2d 414, 422-5 (2d Cir., 1978); Halprin v. NYC Conciliation Bd., 521 F. Supp. 529 (S.D.N.Y., 1981), aff'd 661 F. 2d 909 (2d Cir., 1981).

In Ellentuck, supra, the Court stated (570 F.2d at 423):

> In Matter of Kovarsky v. Housing and Development Administration, supra, 31 N.Y. 2d 184, 335 N.Y.S.

> 2d 383, 286 N.E.2d 882 (1972), the New York Court of Appeals was faced with a constitutional challenge to the enactment under which the respondent agency had acted. The matter was before the court under Article 78 of the New York CPLR * * *. The New York Court of Appeals, while declaring that constitutional challenges should normally be brought by way of an action for a declaratory judgment, nonetheless proceeded to the merits, treating the proceeding as a declaratory judgment action under the power conferred by CPLR §103(c) (McKinney 1972). The Kovarsky principle represented the view of the New York Court of Appeals that a court "should not become involved in drawing fine lines of distinction in characterizing the form in which relief is sought," [citations omitted]. Thus, if the "necessary parties" were before the New York courts, jurisdiction existed under CPLR §103(c) to render a decision on the constitutional questions actually litigated.

Therefore, in the instant case, the New York State Supreme Court was fully within its jurisdiction and powers in the original Article 78 proceeding when it held (50a):

> Petitioner's contention that the action of the respondents

> constituted a taking of property without due process of law is wholly without merit.

Petitioners are less than frank when, in quoting from the New York Supreme Court memorandum decision, they omit this pertinent sentence (Petition, p. 5). It confirms that petitioners not only could but actually did raise constitutional issues in their Article 78 proceeding and that the State courts duly considered them.

After the Article 78 petition was dismissed, petitioners appealed to the Appellate Division arguing due process and class exclusion (Stratford Brief, Deft's Exh. B, pp. 28-34, 30-31; Solil Brief, Deft's Exh. M., pp. 23-24, 30-31). By charging "class exclusion," they plainly and squarely brought up equal protection as well as due process issues. See Fay v. New York, 332 U.S. 261, 284 (1947); Hoyt v. Florida, 368 U.S. 57, 59-60 (1961). The Appellate Division unanimously affirmed without opinion. Matter of Stratford Place Corp. v. Capalino, 81 AD2d 1047 (1st Dept., 1981). Next, the petitioners sought permission to appeal to the Court of Appeals.

The Court of Appeals denied permission to appeal. 55 NY2d 603 (1981).

Thus, regardless of how petitioners phrased their pleadings, they introduced the same evidence and raised the same issues at various stages of the state proceedings that they wish to relitigate in the federal courts. Res judicata and collateral estoppel preclude such a double bite at the judicial apple. Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); Montana v. United States, 440 U.S. 147 (1979); Helprin v. NYC Conciliation and Appeals Bd., 521 F. Supp. 529 (S.D.N.Y. 1981), aff'd 661 F.2d 909 (2d Cir., 1981). The crucial element is the factual predicate of the claims asserted. "For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." Expert Elect Inc. v. Lavine, 554 F. 2d 1227 (2d Cir., 1977).

(2)

Relitigation is barred by the rule of comity embodied in 28 U.S.C. §1738. Migra v. Warren Cty.

Sch. Dist., supra; Kremer v. Chemical Construction Corp., supra; Winters v. Levine, 574 F.2d 46, 54 (2d Cir., 1978). Moreover, in the area of tax law, Congress has specifically enacted a bar to litigation and relitigation in federal courts of local tax matters amenable to state remedy and process. Thus, 28 U.S.C. §1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

This act is a broad jurisdictional barrier. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 470 (1970). It bars federal courts from granting not only injunctions but also declaratory judgments and money damages. California v. Grace Brethren Church, 457 U.S. 393 (1982); Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 113-116 (1981).

The statutory procedures which petitioner challenge are clearly part of New York's method of real estate tax collection. In Nelson v. New York

City, 352 U.S. 103 (1956), this Court, unanimously upheld the basic statute as constitutional in the face of a claim that it violated due process. More recently, this Court reasserted the doctrine that the principal of comity, fundamental to "our Federalism" bars Federal District Court cognizance of damage claims in state tax matters where a remedy is available in the state courts -- since any exercise of such jurisdiction would interfere with the basic function of tax collection essential to the very survival of state and local government. Fair Assessment in Real Estate Assoc. v. McNary, supra, 454 U.S. 100, 108.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WITH COSTS.

Respectfully submitted,

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